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IN THE

Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber")[1] is the world's largest business

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and

federation. It represents an underlying membership of more than three million businesses and organizations in every industrial sector and geographic region of the country.

The Chamber has participated as *amicus curiae* in many cases before this Court, including cases relating to the federal anti-discrimination laws. *See, e.g.*, *Federal Express Corp.* v. *Holowecki*, 127 S. Ct. 2914 (2007) (No. 06-1322) (granting certiorari); *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S 470 (2006); *Burlington Northern & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405 (2006); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997).

SUMMARY OF ARGUMENT

Like other federal statutes that combat discrimination, Section 1981, 42 U.S.C. § 1981, prohibits injury to individuals based on their "status," or membership in a protected group. *Burlington Northern*, 126 S. Ct. at 2412. As originally enacted in 1866, Section 1981 guaranteed each person the same right "as is enjoyed by white citizens" to "make and enforce contracts" – that is, to enter into contractual relationships and sue to enforce them. 42 U.S.C. § 1981(a). *See also Patterson* v. *McLean Credit Union*, 491 U.S. 164, 176-178 (1989). The Civil Rights Act of 1991 expanded the meaning of "make and enforce con-

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its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

tracts" to include all aspects of the contractual relationship through termination, but it did not proscribe anything other than racially motivated interference with contractual rights. 42 U.S.C. § 1981(b).

Unlike numerous other federal anti-discrimination laws, Section 1981 does not expressly prohibit retaliation against individuals who complain about alleged violations of the statute. As the Court recently emphasized in *Burlington Northern*, anti-retaliation provisions proscribe injury based on an individual's "conduct," regardless of his or her membership in a protected class. 126 S. Ct. at 2412. By its terms Section 1981 prohibits only discrimination based on an individual's racial status, not on his or her conduct, and therefore does not prohibit retaliation.

Nor is a retaliation bar implied in the statute. Anti-retaliation rules did not even become the norm until long after Section 1981's enactment. And the ubiquity of such provisions by 1991 establishes *not* that the 1991 amendment added a retaliation proscription to Section 1981 *sub silentio*, but rather that, had Congress intended to proscribe retaliation, it would have done so expressly. A prohibition on retaliation also is unnecessary to effectuate Section 1981's anti-discrimination rule, because employees – who constitute the vast majority of Section 1981 claimants – are already protected from retaliation under Title VII and state law.

The Court's holdings in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), do not support a different conclusion. *Jackson* found

a retaliation prohibition implicit in the particular language of Title IX, but it explicitly *distinguished* statutes that – like Section 1981 – prohibit discrimination based on the individual victim's membership in a protected class. And *Sullivan*, for its part, recognized a cause of action for retaliation under 42 U.S.C. § 1982 on the ground that third parties are often needed to vindicate the property rights protected by the statute – a consideration not relevant to Section 1981. This Court also long ago abandoned *Sullivan*'s overly accommodating interpretive approach of supplementing a statute to effectuate its purpose even absent any valid corresponding evidence of statutory intent. *See, e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

Reading a retaliation prohibition into Section 1981 not only is incompatible with the statute's text and purpose, but it also will have significant adverse consequences for employers and employees alike. The new cause of action recognized by the Seventh Circuit permits plaintiffs who allege retaliation for reporting race discrimination – but not sex discrimination or discrimination based on any other protected characteristic – to file lawsuits outside the limitations period that Congress determined in Title VII is appropriate for all such retaliation claims, and without complying with Title VII's comprehensive conciliation process. *See* 42 U.S.C. §§ 2000e-5(b), (e)(1), (f)(1).

Allowing such suits will frustrate Congress's objective in Title VII of ensuring that retaliation claims are brought before memories fade, witnesses disappear, and personnel documents are discarded in the

regular course of business. And allowing such suits will frustrate Title VII's laudable statutory goal of promptly notifying employers of claims against them so that they can attempt to conciliate. and salvage ongoing employment relationships, before formal litigation – with all of its attendant burdens on both sides – commences.

ARGUMENT

I. SECTION 1981'S PROHIBITION ON RACIAL DISCRIMINATION IN CONTRACTUAL RELATIONSHIPS DOES NOT CREATE A CAUSE OF ACTION FOR RETALIATION.

Section 1981 "protects the equal right of '[a]ll persons within the jurisdiction of the United States' to 'make and enforce contracts' without respect to race." *Domino's*, 546 U.S at 474-475 (quoting 42 U.S.C. § 1981(a)). "[M]ake and enforce contracts" is now defined to "include[ ] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

This Court has long recognized that Section 1981 "protects a limited category of rights." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982) (quoting *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966)). In service of the statute's limited reach, this Court has repeatedly rejected efforts to apply Section 1981 beyond the specific purposes clearly identified in its text. *See, e.g., Domino's*, 546 U.S at 479-480 (rejecting Section 1981 claim by plaintiff lacking rights under the relevant contract); *Rivers* v. *Road-*

way Express, Inc., 511 U.S. 298, 307 (1994) (finding no "clear expression of congressional intent" to apply 1991 amendment to Section 1981 retroactively). The Seventh Circuit's holding that Section 1981 creates a cause of action not only for race discrimination in "mak[ing] and enforc[ing] contracts," but also separately for retaliation against individuals who complain about such discrimination, represents just such an impermissible expansion of Section 1981's scope. The decision should be reversed.

1. Section 1981 does not contain a separate provision prohibiting retaliation. This alone renders the statute unlike numerous other federal anti-discrimination laws, including Title VII, 42 U.S.C. § 2000e-3(a); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); the Family and Medical Leave Act, 29 U.S.C. § 2615; and the Americans with Disabilities Act, 42 U.S.C. § 12203(a), all of which contain express prohibitions against retaliatory conduct. Yet the Seventh Circuit concluded that Section 1981's prohibition of *discriminatory* contract terminations also encompasses *retaliatory* contract terminations. J.A. 137-138. That conclusion is plainly incorrect under this Court's reasoning in *Burlington Northern*.

This Court confirmed in *Burlington Northern* that anti-discrimination and anti-retaliation provisions are not always coterminous. 126 S. Ct. at 2412. As the Court explained, the two provisions serve two different purposes. Substantive provisions barring discrimination on the basis of an individual's race or other protected characteristics "seek[ ] to prevent injury to individuals based on who they are, *i.e.*, their status." *Id.* Anti-retaliation provisions, by

contrast, "seek[ ] to prevent harm to individuals based on what they do, *i.e.*, their conduct," regardless of whether they are also members of a protected class. *Id.* Thus, for example, Title VII, which bars employment discrimination against "any individua * * * because of such individual's race, color, religion, sex, or national origin" (*i.e.*, an individual's status), 42 U.S.C. § 2000e-2(a)(1),(2), contains a *separate* provision prohibiting retaliation against employees who "oppose[ ]" discriminatory conduct or "participate[ ] in" proceedings to enforce Title VII rights (*i.e.*, an individual's conduct). *Id.* § 2000e-3(a). If Title VII's substantive anti-discrimination provision itself prohibited retaliation, then the statute's separate anti-retaliation provision, like those in many other federal statutes, would be superfluous.

Section 1981 is an anti-discrimination provision of the kind described in *Burlington Northern*. Subsection (a), which guarantees to "[a]ll persons * * * the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens," 42 U.S.C. § 1981(a), by its terms prohibits harm based on an individual's *status*, not his or her conduct. The statute prohibits discrimination based on the individual victim's race. *See Domino's*, 546 U.S. at 480 ("Section 1981 plaintiffs must identify injuries flowing from a *racially* motivated breach of their own contractual relationship") (emphasis added); *see also McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (construing Section 1981 to apply to whites as well as non-whites). Nothing in the plain language of subsection (a) additionally prohibits retaliation against individuals based on conduct – for

example, a stated opposition to race discrimination in contracting.[2]

The language now codified in subsection (a), moreover, was originally enacted in 1866, decades before anti-retaliation prohibitions became the norm. *See* J.A. 160 (Easterbrook, C.J., dissenting in part) (noting that Section 1981 was enacted "long before anti-retaliation norms were created"). It is therefore impossible to impute to the statute's framers any intent implicitly to incorporate an anti-retaliation prohibition into Section 1981's plain text.

2. The Seventh Circuit majority dismissed the distinction between anti-discrimination and anti-retaliation provisions recognized in *Burlington Northern* as a "heightened degree of formalism" that was "dispensed with" by the Civil Rights Act of 1991. J.A. 138. But the court's conclusion finds no support in the 1991 Act.

Section 101 of the 1991 Civil Rights Act, codified as 42 U.S.C. § 1981(b), amended Section 1981 to define "make and enforce contracts" to "include[ ] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, Tit. I, § 101(2). The amendment was adopted "in response to *Patterson*," *Rivers*, 511 U.S.

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[2] In some cases, the alleged retaliation victim claims to have suffered retaliation for complaining about discrimination against himself. In other cases, the plaintiff alleges retaliation for opposing discrimination against others. In both situations, the claim is based not on the plaintiff's race, but on his conduct, and is therefore not actionable under Section 1981.

at 309, which held that Section 1981, as originally enacted, did not extend to racial harassment occurring after a contract's formation. *Patterson*, 491 U.S. at 178-182.

Patterson did not address the issue of retaliation, nor does Section 101, by its plain terms, prohibit retaliation. On the contrary, the 1991 amendment retains Section 1981's focus on discrimination based on the individual victim's race. Pub. L. 102-166, § 101(1) (retaining original statutory language as 42 U.S.C. § 1981(a)). The language Congress employed to expand the meaning of the phrase "make and enforce contracts," moreover, closely tracks the substantive anti-discrimination provision of Title VII – the provision the *Burlington Northern* Court recognized does not itself prohibit retaliation. *See* 126 S. Ct. at 2412; 42 U.S.C. § 2000e-2(a)(1) (prohibiting discriminatory "refus[al] to hire," "discharge," and other discrimination "with respect to [an individual's] compensation, terms, conditions, or privileges of employment"). Had Congress intended the 1991 amendment to Section 1981 to reach retaliation, it surely would have looked to Title VII's anti-retaliation provision – rather than Title VII's substantive provision – for its model.

Congress also enacted another anti-retaliation provision elsewhere in the Civil Rights Act of 1991 itself. Title III of the 1991 Act, which extended the protections of other anti-discrimination laws to Senate employees, Pub. L. 102-166, Title III, § 302, separately prohibited "[a]ny intimidation of, or reprisal against" individuals exercising these statutory

rights. *Id.* § 312 (repealed 1995).[3] The absence of similar language in Section 101 of the 1991 Act reinforces the conclusion that Congress did not intend its amendment of Section 1981 to address retaliation. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) (when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, * * * Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citation and quotation marks omitted). *See also Gomez-Pérez* v. *Potter*, 476 F.3d 54, 59 (1st Cir. 2007) (ADEA provision barring age discrimination against federal employees does not prohibit retaliation, because another section of the same statute explicitly prohibits retaliation against private employees), *cert. granted*, __ S. Ct. __, 2007 WL 989594 (U.S. Sept. 25, 2007) (No. 06-1321).

3. The existence of explicit anti-retaliation provisions in other anti-discrimination laws, as well as in Title III of the 1991 Civil Rights Act itself, confirms what the text of Section 1981 already makes clear: the statute prohibits *discrimination* in contractual relationships, not discrimination *and retaliation.* Against this evidence, the *CBOCS* majority offers in support of its contrary conclusion only a single statement from a House Committee report. J.A. 134-135, 138. As this Court has repeatedly recognized, however, a "snippet of legislative history" that "is 'in no way anchored in the text of the statute' " is far too slender a reed on which to rest a new cause of action. *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997) (quot-

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[3] A similar anti-retaliation provision applicable to all congressional employees now appears at 2 U.S.C. § 1317(a).

ing *Shannon* v. *United States*, 512 U.S. 573, 583 (1994)). Because the single statement on which the Seventh Circuit relies contradicts, rather than confirms, the statutory text, it cannot control. *See Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (observing that "the authoritative statement is the statutory text, not the legislative history," and recognizing the danger of relying on committee reports that permit "strategic manipulations of legislative history to secure results" that the drafters "were unable to achieve through the statutory text").

Nor can it be argued that Congress intended the 1991 amendment to restore certain lower court decisions holding that Section 1981 encompasses retaliation. This Court expressly left open the question whether *Patterson* itself had any impact on retaliation claims. *See Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). And in *Rivers*, the Court squarely rejected the argument that the 1991 Act "restor[ed]" any previously recognized rights; rather, the Act "'*expand[ed]*" Section 1981 to create new rights that did not exist before. *Rivers*, 511 U.S. at 308 (quoting Pub. L. 102-166, § 3(4)) (emphasis in original). Section 101 of the 1991 Act expanded Section 1981 to bar discrimination occurring after the formation of a contract. It did not expand the statute to bar retaliation.

* * *

Section 1981, as originally enacted, did not prohibit retaliation. The 1991 Act similarly evinces no "clear expression of congressional intent," *Rivers*, 511 U.S. at 307, to reach retaliation. Consistent with this

Court's precedents interpreting Section 1981 to protect only a "limited category of rights," *General Bldg. Contractors*, 458 U.S. at 384, the Seventh Circuit's holding that the statute prohibits retaliation therefore should be reversed.

II. *JACKSON* AND *SULLIVAN* DO NOT SUPPORT A DIFFERENT CONCLUSION.

The Seventh Circuit erred in concluding that *Jackson* and *Sullivan* "compel[ ]" the conclusion that Section 1981 prohibits discrimination *and* retaliation. J.A. 139, 144. Those two cases do not even support that result, much less compel it.

1. *Jackson* held that Title IX's prohibition on intentional sex discrimination by federal funding recipients contains an implicit retaliation prohibition. 544 U.S. at 174. The *CBOCS* majority read the Court's statement in *Jackson* that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *Jackson*, 544 U.S. at 173, to "jettison[ ]" any distinction between retaliation and discrimination claims in *all* anti-discrimination laws that do not expressly proscribe retaliation. J.A. 141.

The Seventh Circuit majority's reading of *Jackson* is overbroad and incorrect. *Jackson* held only that the particular language of Title IX is sufficiently broad to proscribe retaliation. Title IX provides that "[n]o person * * * shall, on the basis of sex, * * * be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX's statutory prohibition of "discrimination" "on the basis of sex" encompasses

retaliation, the Court reasoned, because the prohibition does not focus exclusively on the individual victim's status. *Jackson*, 544 U.S. at 174. The Court took pains to observe that, "[i]f the statute provided instead that 'no person shall be subjected to discrimination on the basis of *such individual's* sex,' " Title IX would not protect those who complain about discrimination against retaliation for such conduct. *See id.* at 179 (emphasis in original).

Section 1981 does not use the word "discrimination" or the phrase "on the basis of race." It guarantees all individuals the same right to contract "as is enjoyed by white citizens." 42 U.S.C. § 1981(a). This language, just like the hypothetical "such individual" statute described in *Jackson*, focuses on the racial status of the individual contracting party. Thus under *Jackson's* reasoning, Section 1981 is not broad enough to cover those who, regardless of their race, complain about discrimination.

The *Jackson* Court also reasoned that protection against retaliation is necessary under Title IX because those who report violations of the statute often have no other recourse against retaliation, and because, in educational settings, third persons such as teachers and coaches "are often in the best position to vindicate the rights of their students." 544 U.S. at 180-181. Neither rationale applies to Section 1981.

There is no reason to suppose that victims of race discrimination in contractual relationships – including employment relationships, which constitute the

vast majority of Section 1981 cases[4] – are unable to identify and report discrimination against themselves. *See Domino's*, 546 U.S. at 479 ("Injured parties 'usually will be the best proponents of their own rights.'") (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976)). Nor is retaliation for such a report likely to go unpunished; Title VII specifically prohibits retaliation against employees who complain about race discrimination against themselves or others. 42 U.S.C. § 2000e-3(a). *See* J.A. 160 (Easterbrook, C.J., dissenting in part). Employees not covered by Title VII, moreover, frequently have other avenues of redress. For example, plaintiffs who work for employers not subject to Title VII because they have fewer than fifteen employees, 42 U.S.C. § 2000e(b), may have recourse under state civil rights laws with no or lower numerosity requirements.[5] Indeed, if

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[4] *See, e.g.*, *Williams* v. *Federal Nat'l Mortgage Ass'n*, 2006 WL 1774252, at *6 (D.D.C. June 26, 2006) (noting that "there are few cases addressing § 1981 outside of the employment context, and even fewer cases dealing with retaliation outside the employment context under § 1981") (internal quotation marks omitted).

[5] Several state civil rights statutes define the term "employer" to include employers with one or more employees. *See, e.g.*, ALASKA STAT. § 18.80.300(5); D.C. CODE § 2-1401.02(10); HAW. REV. STAT. ANN. § 378-1; ME. REV. STAT. ANN. tit. 5, § 4553.4; MICH. COMP. LAWS ANN. § 37.2201(a); MINN. STAT. ANN. § 363A.03(16); MONT. CODE ANN. § 49-2-101(11); N.D. CENT. CODE § 14-02.4-02(8); WIS. STAT. ANN. § 111.32(6)(a). Others contain minimums significantly lower than Title VII's. *See, e.g.*, CAL. GOV'T CODE § 12926(d) (5 or more employees); CONN. GEN. STAT. ANN. § 46a-51 (3 or more); DEL. CODE ANN. tit. 19, § 710(6) (4 or more); IDAHO CODE ANN. § 67-5902(6) (5 or more); KAN. STAT. ANN. § 44-1002(b) (4 or more); N.M. STAT. ANN.

Humphries had worked for a small employer not covered by Title VII, he might have been able to sue for retaliation under the Illinois Human Rights Act, which does not impose any numerosity requirement for retaliation claims. *See Dana Tank Container, Inc.* v. *Human Rights Comm'n*, 687 N.E.2d 102, 104 (Ill. App. Ct. 1997).[6] This plainly is not a case in which "all manner of [Section 1981] violations might go unremedied" if a retaliation provision were not shoehorned into the statute. *Jackson*, 544 U.S. at 180.

2. *Sullivan*, for its part, rested on concerns similar to those at issue in *Jackson* and thus absent here. *Sullivan* held that a white person had standing to sue under 42 U.S.C. § 1982, which prohibits race discrimination with respect to property rights, when he was expelled from membership in a community recreational facility after protesting his inability to lease his membership to a black person. Analogizing the situation to a racially restrictive covenant, the Court allowed the suit, noting that in such cases "the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant.'" *Sullivan*, 396 U.S. at 404 (quoting *Barrows* v. *Jackson*, 346 U.S.

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§ 28-1-2(B) (same); N.Y. EXEC. LAW § 292(5) (same); OHIO REV. CODE ANN. § 4112.01(A)(2) (same).

[6] *See also* 775 ILL. COMP. STAT. ANN. 5/6-101(A). Several other state statutes similarly do not limit the application of their anti-retaliation provisions to statutory "employers." *See, e.g.*, D.C. CODE § 2-1402.61(a); IDAHO CODE ANN. § 67-5911; IOWA CODE ANN. § 216.11.2; MASS. GEN. LAWS ANN. CH. 151B, § 4(4); MONT. CODE ANN. § 49-2-301; N.H. REV. STAT. ANN. § 354-A:19; N.M. STAT. ANN. § 28-1-7(I)(2); N.D. CENT. CODE § 14-02.4-18; OHIO REV. CODE ANN. § 4112.02(I).

249, 259 (1953)). No alternative remedy was available when *Sullivan* was decided; the recently enacted Fair Housing Act, 42 U.S.C. §§ 3601-3631, was inapplicable to the pre-enactment conduct at issue in the case. *Sullivan*, 396 U.S. at 240. Here, by contrast, third parties are unnecessary to vindicate the equal right to contract protected by Section 1981, and there is generally an effective alternative remedy for persons who report violations of the statute who thereafter are retaliated against.

The Court also has long since abandoned the *Sullivan* Court's approach of "supplement[ing] statutes to make them 'more effective,' " regardless of whether the supplementation has any basis in the statutory text. J.A. 163-165 (Easterbrook, C.J., dissenting in part). Unless there exists statutory evidence of Congress's intent to create a cause of action, that "cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-287. *See also Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original).

The *Sandoval* Court rejected a claim that Title VI, which proscribes intentional race discrimination by federal funding recipients, 42 U.S.C. § 2000d, contains a private right of action to enforce disparate impact regulations promulgated under it. *Sandoval*, 532 U.S. at 285-293. As this Court explained, the once-prevalent "understanding * * * that 'it is the

duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed in a statute," *id.* at 287 (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)), was abandoned in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), and the Court has "not returned to it since" – even when construing a statute previously interpreted under the now-rejected method. *Sandoval*, 532 U.S. at 287 (citing *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), and other cases construing the Securities Exchange Act of 1934).

Finding no evidence of congressional intent in "the text and structure of Title VI" to create the proposed private right of action, the *Sandoval* Court held that the cause of action did not exist. 532 U.S. at 289. It reached this conclusion even though "every Court of Appeals to address the issue" had found that the proposed private right of action was compelled by prior Supreme Court precedents. *Id.* at 294 (Stevens, J., dissenting).

Sandoval's reasoning applies with equal force here. As discussed in Part I, above, nothing in the text or structure of Section 1981 or the Civil Rights Act of 1991 evinces Congress's intent to include in Section 1981 a cause of action for retaliation. Neither *Jackson* nor *Sullivan* hold to the contrary. Even if a retaliation prohibition might be thought useful in limited circumstances to effectuate Section 1981's antidiscrimination prohibition, a prohibition on retaliation cannot be implied absent support in the statute itself – for which there is none. The *Sandoval* Court, having "sworn off the habit of venturing beyond

Congress's intent," declined to "accept [the] invitation to have one last drink." 532 U.S. at 287. This Court should hold equally fast.

3. The *Jackson* Court's partial reliance on *Sullivan* does not require the Court to resurrect in this case the long-since-discarded interpretive method *Sullivan* embraced. *Jackson* found *Sullivan* relevant to the Title IX interpretation issue in that case because *Sullivan* was decided just three years before the enactment of Title IX, and it therefore illumined Congress's expectations as to how Title IX would be interpreted. *Jackson*, 544 U.S. at 176 (" '[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it].' ") (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979)).

It was fair enough for the *Jackson* Court to consult *Sullivan* for insight into Congress's intent behind Title IX. But by the same reasoning, then, Congress's amendment of Section 1981 in the 1991 Civil Rights Act should be construed not in light of *Sullivan*, but rather in light of the interpretive method that the Court in *Patterson* applied to Section 1981. *Patterson* makes abundantly clear that claims are not cognizable under Section 1981 unless they are clearly mandated by the statutory text. *See Patterson*, 491 U.S. at 178-182. The legal context in which the 1991 amendment was enacted thus reinforces the conclusion that, had Congress intended to create a cause of action for retaliation in Section 1981, it would have done so explicitly. *See* J.A. 165 (Easter-

brook, C.J., dissenting in part) ("There has been a sea change in interpretive method between *Sullivan* and today – and *Patterson* not only exemplifies the change but also applies it to § 1981.").

The 1991 Civil Rights Act may have superseded *Patterson's* holding regarding the scope and meaning of the statutory term "make and enforce contracts," but the 1991 Act did not (indeed could not) overrule *Patterson's reasoning*. The Court made just this point in *Domino's*, its most recent Section 1981 case. Citing *Patterson*, *Domino's* held that "the plain text of the statute" precludes Section 1981 claims by plaintiffs who lack rights under the relevant contract. *Domino's*, 546 U.S. at 476-477, 479-480.[7]

* * *

For all of these reasons, the Seventh Circuit majority erred in concluding that *Sullivan* and *Jackson* require recognition of an implicit cause of action for retaliation under Section 1981. The Court's recent decisions construing Section 1981, including *Domino's*, *Patterson*, and *Rivers*, provide the appropriate interpretive model. Consistent with these precedents, the Court should hold that, because there is no basis for it in the text or structure of the statute, Section 1981 contains no cause of action for retaliation.

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[7] Notably, the Court was expressly invited in *Domino's* to rely on *Sullivan*; it declined to do so. *See* Brief for the Respondent at *6, 8, 12 n.6, 34-36, 40, *Domino's Pizza, Inc.* v. *McDonald*, 547 U.S. 470 (2006) (No. 04-593), 2005 WL 2367598.

III. ENGRAFTING A RETALIATION PROHIBITION ONTO SECTION 1981 WOULD UNNECESSARILY UNDERMINE TITLE VII'S CONCILIATION PROCESS.

Engrafting onto Section 1981 a retaliation prohibition that has no basis in the text also will have significant adverse consequences for employers and employees. The cause of action recognized by the Seventh Circuit allows an employee claiming to have suffered retaliation for reporting race discrimination to file a lawsuit under Section 1981 outside of Title VII's limitations period, and without Title VII's mandatory conciliation procedures.

There is no doubt that plaintiffs can proceed simultaneously under Title VII and Section 1981 when both statutes confer overlapping rights. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). But it does not follow that, in determining whether Section 1981 confers a parallel right in the first instance, courts must blind themselves to the conflicts that recognizing such a right would create. As the Court stated in *Patterson*:

> We agree that * * * there is some necessary overlap between Title VII and § 1981, and that where the statutes do in fact overlap we are not at liberty "to infer any positive preference for one over the other." We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. [*Patterson*, 491 U.S. at 181 (quoting *Johnson*, 421 U.S. at 461).]

The *Patterson* Court reasoned that the availability of Title VII as an alternative remedy for victims of racial harassment "should deter us from a tortuous construction of [Section 1981] to cover this type of claim." 491 U.S. at 181. So too here. Section 1981 does not contain a retaliation prohibition, and the Court similarly should consider the practical consequences of engrafting such a prohibition onto the statute.

Those consequences would be significant in two respects. *First*, plaintiffs alleging retaliation for reporting discrimination based on race – but not based on sex, religion, or other protected characteristics – could disregard the limitations period that Congress determined in Title VII should apply to all such retaliation claims. Title VII requires plaintiffs to file a charge with the Equal Employment Opportunity Commission (EEOC) within either 180 or 300 days of the alleged violation as a prerequisite to proceeding in court. 42 U.S.C. § 2000e-5(e)(1), (f)(1). Section 1981 contains no similar requirement, and it is unclear what limitations period would apply to a retaliation claim under the statute. If retaliation were prohibited by Section 1981(b) (and it plainly is not), then the federal four-year catchall statute of limitations would apply. *See* 28 U.S.C. § 1658(a) ("[A] civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues."); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (applying § 1658 to discriminatory termination, transfer, and hostile environment claims under § 1981, because such claims were not possible prior to the 1991 amendment). If, however, retaliation

were prohibited by Section 1981(a) (again, it clearly is not), then the most appropriate state limitations period would govern. *Donnelley*, 541 U.S. at 382. In either event, the limitations period that Congress decided in Title VII should apply to retaliation claims would be eviscerated.

The risk of stale claims is substantial in retaliation cases, because they so often turn on questions of intent. Memories fade, potential witnesses may leave the defendant's employ, and relevant personnel documents may not be retained in the ordinary course of business. *See* 29 C.F.R. § 1602.14 (requiring employers to preserve "personnel or employment record[s]" for one year from the date of their making or from employee's discharge). Thus, "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened," *Ledbetter*, 127 S. Ct. at 2170, to the detriment of both the employer and the employee, who carries the ultimate burden of proof. That is why this Court has repeatedly recognized that " 'strict adherence' " to Title VII's filing deadlines " 'is the best guarantee of evenhanded administration of the law.' " *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 108 (2002) (quoting *Mohasco* v. *Silver*, 447 U.S. 807, 826 (1980)). Indeed, just last Term the Court reiterated that Title VII's statute of limitations is vital to " 'protect[ing] employers from the burden of defending claims arising from employment decisions that are long past.' " *Ledbetter*, 127 S. Ct. at 2170 (quoting *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-257 (1980)). All of these legal and practical justifications for requiring prompt filing of retaliation claims would be frustrated if employees

could bring suit under Section 1981 years after the alleged injury.

Second, the Court also has recognized the importance of Title VII's " 'integrated, multistep enforcement procedure,' " *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977)), in securing administrative resolution of charges and thus enabling employers and employees to avoid the time and expense of formal litigation. *See Shell*, 466 U.S. at 78 (noting Congress's objective in Title VII to remedy "violations of the statute * * * without resort to the courts"); *see also W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 770-771 (1983) ("Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII.") (citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

The EEOC resolves a significant number of charges annually, including retaliation charges, which in the last decade have been filed with increasing frequency. *See* EEOC Charge Statistics, http://www.eeoc.gov/stats/enforcement.html (last viewed Nov. 6, 2007). Even when charges are not successfully conciliated, the administrative process allows both parties to assess the strength of their relative positions prior to litigation. *See EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case, as well as his own.").

Title VII also requires that the EEOC notify the employer within ten days when a charge is filed against it, 42 U.S.C. § 2000e-5(b) – long before, and perhaps even *years* before, a defendant receives notification of a Section 1981 claim when it is first filed in court. Title VII's notice requirement allows employers to redress unlawful practices promptly and to retain records necessary to determine the intent behind challenged employment decisions. And when the alleged retaliation is a decision, such as a failure to promote, that falls short of termination, early notification often enables employers to work directly with complainants to resolve the dispute before it escalates into full-blown litigation. Pre-litigation conciliation thus facilitates efforts to salvage ongoing employment relationships in which both employer and employee have made significant investments.

All of these important goals would be utterly thwarted if employees alleging retaliation for reporting race discrimination could wait years without notifying the employer of their grievances – and then commence full-scale litigation. This Court should not reach out to create a cause of action that would so deeply undermine Title VII's comprehensive enforcement and conciliation scheme.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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